IN GOOD CONSCIENCE

CONSCIENCE CLAUSES AND REPRODUCTIVE RIGHTS IN EUROPE—WHO DECIDES?

CATHOLICS FOR CHOICE

CATHOLICS
FOR
CHOICE

1436 U Street NW, Suite 301
Washington, DC 20009-3997

www.CatholicsForChoice.org
cfc@CatholicsForChoice.org
T: +1 (202) 986-6093
F: +1 (202) 332-7995

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CONSCIENCE CLAUSES AND REPRODUCTIVE RIGHTS IN EUROPE—WHO DECIDES?

While relatively easy access to reproductive healthcare services in many European countries appears to be uncontested, opponents of reproductive rights have become more creative in placing hurdles in the way of women seeking those services. By promoting changes in the law as well as seeking to modify the vast array of policies and guidelines that govern healthcare services, antichoice advocates have sought to restrict women's rights and compromise their health.

One example of this tactic involves attempts to expand the use of refusal clauses (also known as exemption clauses or conscience clauses) under the guise of protecting healthcare providers who have a religious or moral objection to providing some or all reproductive health services. The reality is, however, that antichoice activists are not concerned with an individual's conscience—they want to end access to abortion and contraception.

The Catholic hierarchy—through the Holy See and bishops in many countries—has promoted this trend by claiming that the consciences of medical professionals are routinely violated and by seeking to expand the number of services covered by these exemptions.

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This pamphlet gives a brief overview of some of the key themes in the debate—how conscience clauses have evolved and what Catholic teachings on conscience really are—especially within the context of reproductive health and rights. We hope that the information presented here will be useful for policymakers, as well as those interested in healthcare ethics, those who may be negotiating conscience clauses and anybody who may be considering their own position on these issues.

A Brief Summary of the Development and Implementation of Conscience Clauses in Europe

In general, a conscience clause should be regarded as offering an individual the right to be exempted or excused from performing certain otherwise compulsory legal duties. This right is positively expressed in various national legal instruments—legislation or constitutions—and has also been included in some supranational instruments—concordats, treaties and conventions.[1]

Conscience clauses in European law are most commonly discussed in relation to military service.[2] For the purposes of our investigation, however, we shall concentrate on their application to the healthcare field. Some healthcare workers refuse to participate in the provision of services related to contraception, sterilization or abortion, for example, claiming that to do so would violate their consciences.

Some conscience clauses include protections for patients to ensure that they are not denied treatment. Ideally, all such clauses would require a doctor who invokes a conscientious objection to refer the patient to another doctor; if abortion is legal the woman should be guaranteed effective access to receive one; and in cases where there is only one qualified doctor (for example, in a remote or rural area), he or she should not be able to invoke a conscience clause to be excused from providing care to a patient. However, few are written with all of these protections explicitly in place.

The grave consequences of the absence of such protections are illustrated by the situation faced by women seeking an abortion in Italy. While the country allows abortion up to 90 days' gestation, up to 70 percent of the country's doctors are conscientious objectors, leading to a shortage of doctors and centres willing to terminate a pregnancy. The situation forces women to address several hospitals to perform an abortion and often requires them to travel significant distances to obtain the service.[3] In one case, a conscientious objection to the performance of a life-saving abortion by a doctor in Sicily may have led to a woman's death.[4]

While most conscience clauses are considered to refer to doctors directly engaged in a procedure, others are more loosely defined and could be inferred to include others with less direct involvement in the actual procedure. For example, there have been cases involving pharmacists refusing to dispense emergency contraception and healthcare institutions refusing to provide abortion or emergency contraception, resulting in women effectively being denied access to a legal abortion or necessary medication. In 2007, Pope Benedict XVI called upon pharmacists to refuse to dispense emergency contraceptives (EC) if they objected on moral grounds, prompting an angry reaction from

politicians and pharmacists in Italy.[5] The following year, it was reported that two women in the Tuscany region of Italy had been refused EC by doctors on conscience grounds, prompting criticism by local health officials who argued that the prescription of EC has "nothing to do with the issue of conscientious objection."[6] And in 2010, a UK pharmacist refused to serve a mother of two with a prescription for the contraceptive pill because it went against the pharmacist's religious beliefs. In this case, a national ethics code was cited to show how the pharmacist was acting within his rights.[7]

In 2010, as a result of heavy influence of antichoice organisations active at the Council of Europe, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution on "The right to conscientious objection in lawful medical care," known also as the McCafferty report. The original version of the report, entitled "Women's access to lawful medical care: the problem of unregulated use of conscientious objection" was heavily redacted in the amendment process.[8] The final resolution states that "no person, hospital or institution shall be coerced, held liable or discriminated against" as a result of conscientious objection, but also that "the unregulated use of conscientious objection may disproportionately affect women."[9] However, the resolution is not binding to Council of Europe member states.

Nevertheless, several cases have contested broader interpretations of conscience clauses. In a 1999 French case, *Pichon and Sajous v. France* that went before to the European Court of Human Rights, the court ruled against the pharmacist who refused to sell contraceptives. It said that when "the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products."

> The ECHR makes clear provision both for freedom of conscience and for the appropriate limits on the exercise of that freedom in terms of others' rights.

In Britain in 2007, the private Catholic hospital of St John and St Elizabeth bowed to pressure from Cardinal Cormac Murphy O'Connor, then Britain's senior Catholic leader, and agreed to a code of ethics barring its doctors from referring women for abortion or providing contraceptives.[10] Following a series of acrimonious and public discussions, a new code was adopted in 2008 that allowed for abortion referrals and prescriptions for the contraceptive pill.[11]

In 2015, the Sweden's Labor Court ruled that Jönköping County has not discriminated against a midwife who refused to assist in providing abortions, give out EC, or insert the contraceptive coil on the grounds of her faith, by refusing to employ her.[12] In a similar decision, the British Supreme Court ruled in 2014 that right to conscientious objection did not extend to auxiliary personnel involved in abortion provision, but only to the doctors performing the procedure, rejecting the demands of two midwives to be included under the provision.[13]

The German Federal Administrative Court has also ruled that public hospitals are required to provide abortion services. This provides case law to show that states must ensure the availability of legal medical services—including reproductive healthcare services— and provide convenient and easy access to alternatives when medical personnel refuse to do so.

> At local, national and supranational forums, the Vatican's representatives have placed the emphasis on the most conservative interpretations of Catholic teachings.

GROUNDED IN HUMAN RIGHTS

The discussion around conscience clauses centres on human rights. In Europe, the regional human rights instruments are those adopted by the Council of Europe. The Council, based in Strasbourg (France), was founded in 1949 and now covers virtually the entire European continent with its 47 member countries. It seeks to develop common principles throughout Europe based on the European Convention on Human Rights (ECHR), the most important supranational instrument which has been ratified by most European countries.

The ECHR makes clear provision both for freedom of conscience and for the appropriate limits on the exercise of that freedom in terms of others' rights. Article 9(1) states, "Everyone has the right to freedom of thought, conscience and religion…." This is further explained in Article 14, which states, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as…religion, political or other opinion…." However, it is qualified by Article 9(2), "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." In terms of healthcare, the use of conscience clauses is limited by those articles

that protect the right to life and the right to privacy, including Article 2(1), "Everyone's right to life shall be protected by law" and Article 8(1), "Everyone has the right to respect for his private and family life...."

Other international human rights treaties relevant to conscientious objection in the field of healthcare include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These treaties also outline the right to freedom of conscience, thought and religion as well as the right to the highest attainable standard of physical and mental health.[14]

Countries that have ratified the international treaties discussed above are bound by them, with some exceptions. For example, the strength that the agreements have in relation to national law varies from country to country. The UK, for example, has its own Human Rights Act (1998) based on the provisions in the ECHR, so the ECHR itself has relatively less weight than the national Human Rights Act. There are also differences in the way in which EU member states and professional associations deal with the issue of conscience clauses.

Nation states can also challenge certain features of international conventions. The European Court of Human Rights leaves discretion to each party to a convention to regulate in certain matters—the predominant example from the case law being in matters of morality—where there is no European consensus or common ground. The legal framework also allows for other treaties, or concordats, to be agreed that could compromise some of the principles of human rights legislation.

THE VATICAN'S INFLUENCE

As the European Union has expanded, the Vatican has sought to play a more prominent role in European politics. At local, national and supranational forums, the Vatican's representatives have placed the emphasis on the most conservative interpretations of Catholic teachings, opposing access to contraception, abortion and assisted reproductive technologies.[15]

One manner in which the Vatican has tried to impose its will is through the use of concordats—individual agreements with countries. This issue came to the fore in 2005, when the EU Commission requested an expert opinion from the European Union Network of Independent Experts on Fundamental Rights about a draft treaty between the Vatican and the Slovak Republic.[16] In what one report described as "a morality pact with the Vatican on conscientious objection,"[17] Slovakia was encouraged to recognise the right "of all" to conscientious objection according to Catholic doctrines. If ratified it would have been binding on both parties under international law, terminable only by joint agreement—the result of the Holy See being internationally recognised as an independent state. The opinion found that such a treaty would put the Catholic Church in a privileged position "both by its definition of conscientious objection in terms of Catholic doctrine and by its status in international law by contrast with the local agreements envisaged by the government with certain other churches registered with the state."[18] It concluded that the proposed treaty would violate the Slovak Republic's obligations under the ICCPR, the ICESCR and CEDAW.

Slovakia's so-called "conscience concordat" sparked public protest. In 2006, the government lost power as a result of the struggle over the concordat. However, continuing attempts by the Vatican to

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agree a concordat that included a strict refusal clause were noted in 2007, as was the abandonment by the Slovak Health Ministry of its plan to cancel physicians' right to exercise conscientious objection.[19] The use of such tools as concordats, and the Vatican's ongoing attempts to challenge or subvert international treaties, mean that women and men seeking legal reproductive healthcare services can be denied access to, or have great difficulty in accessing, these services.

The Vatican continues to intervene politically in European countries, taking the stance that its views reflect not only its own opinion, but also the views of Catholics in that country. However, there is ample evidence that few Catholics agree with the Vatican's hard line on contraception and the provision of abortion.[20]

In 2005, Spain's Catholic hierarchy, under the direction of the Vatican, organized a series of demonstrations against the Socialist Party (PSOE) government's legalisation of same sex marriage.[21] In 2010, Catholic bishops were influential in organising opposition to the liberalisation of Spain's abortion law: opposition that eventually failed.[22] However, the Catholic hierarchy remains a powerful political force in Poland, Ireland and several other European countries.

Pope Benedict XVI in 2010 condemned new British equality legislation for running contrary to "natural

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law," and for creating "limitations on the freedom of religious communities to act in accordance with their beliefs."[23] In 2007, during the passage of the Human Fertilisation and Embryology Bill through the British parliament, the Catholic Bishops Conference of England and Wales sent a "resource pack" to parishes to highlight their views on such issues as abortion and stem cell research, and to help Catholics "proactively respond" to the bill. This document argues that: "The Church teaches very clearly that every human life must be respected and protected absolutely from the moment of conception" and that, in relation to the question of whether a politician should vote for an amendment to a law that still allows some abortions: "The Church teaches that, if it is not possible to overturn a pro-abortion law, a politician whose absolute personal opposition to abortion is well known, may morally support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences."[24]

Catholic Teachings on Conscience and Medical Ethics

While there are many definitions of conscience, many people recognise it as an internal moral compass, a place where truth and guidance are revealed through the lens of personal values and an understanding of right and wrong. It is a central element of Catholic moral teaching and is derived from our free will, which allows us to make truly voluntary choices.

Yet, while conscience has a vital internal aspect, in order for it to be fully exercised we must also be aware of how our decisions affect and are affected by external realities. In the long history of the Catholic moral tradition, this is referred to as the conflict between the subjective and the objective aspects of conscience. Subjectively, one's conscience can possess an intention that is either sincere or insincere.

Objectively, one's conscience can possess information that is either true or erroneous.[25]

Drawing from this framework, one's conscience can take four forms. The ideal form is the sincere and true conscience; the worst form is the insincere and erroneous conscience. The other two forms are more ambiguous. However, the Catholic moral tradition grants primacy to the subjective aspect of conscience and therefore questions the moral value of acts resulting from a true but insincere conscience—e.g. donating money to help the poor just to impress others. When one's conscience is sincere in intention but based on erroneous information, one's error can further be subdivided into two forms: vincible ignorance—where you were negligent or should have known better—and invincible ignorance—where ignorance is justifiable and you need not act with a guilty conscience.[26]

Early church writers put forth their opinions on teachings regarding conscience. In his letters, St Paul grants primacy to one's own conscience, and at the same time, uplifts respect for the conscience of others. He notes that "anything which does not arise from conviction is a sin,"[27] and also believed that sometimes it would be more loving to refrain from exercising one's own conscience in order to demonstrate respect for the conscience of another, even if that other's conscience is erroneous.[28] St Thomas Aquinas argued simply that one must follow

an erroneous conscience. He also said that ignoring an erroneous conscience is a mortal sin—even if it means going against the teachings of a professional or religious superior.[29]

Catholic teachings about conscience have developed over time. In post-Reformation Catholicism, theologians taught that conscience could be guided, but not forced in any direction. As Catholicism entered the age of the scientific revolution, it became more apparent that people needed to trust their own experience. Yet, as in the case of Galileo, the hierarchy often could not accept that evidence might require it to re-examine its own teachings. However, as the 1965 "Declaration on Religious Freedom" noted,

> **"It is through his conscience that man sees and recognises the demands of divine law. He is bound to follow this conscience faithfully in all his activity so that he may come to God, who is his last end. Therefore he must not be forced to act contrary to his conscience."[30]**

These teachings apply today in discussions about refusal clauses that are enacted to give, for example, pharmacists the right to deny emergency contraceptives to a patient on moral or religious grounds. A Catholic pharmacist does not have to deny emergency contraceptives to a customer in order to be considered a good and faithful Catholic. In fact, as explained further below, Catholic teaching requires due deference to the conscience of others in making decisions—meaning that the pharmacist must not dismiss the conscience of the person seeking emergency contraception.

As Fr Richard Gula, Professor of Moral Theology at the Franciscan School of Theology in Berkeley, Calif., argues, "If a person spends his or her life doing what he or she is told to do by someone in

The Catholic hierarchy should take into account the experiences and beliefs of patients and healthcare providers so that patients will not be refused any legal and medically appropriate treatment.

authority simply because the authority says so, or because that is the kind of behaviour expected by the group, then that person never really makes moral decisions which are his or her own. For moral maturity, one must be one's own person. It is not enough to follow what one has been told."[31]

Others agree. A Catholic should never feel as though she or he must accept without question the teachings of the church to prove loyalty to the institution. To do so, as Professor of Moral Theology Timothy E O'Connell rightly asserts, "is ultimately to violate the nature of the church, the nature of humanity, and surely the nature of conscience."[32]

We are regularly reminded about the primacy of a person's conscience when it differs from or conflicts with official church teaching. Pope Pius XII noted that "out of respect for those who are in good conscience ... and are of a different opinion, the church has felt herself prompted to act, and has acted, along the lines of tolerance."[33]

The German moral theologian Bernard Häring argued that morality must arise from a personal relationship with God, and saw legalism as a danger.[34] His writing on medical ethics drew on the Arisotelian-Thomist tradition, and also the personalist tradition, which emphasizes individual autonomy and responsibility. As Soane explains, this led Häring to espouse a "holistic" concept of health; which, for example, interpreted the use of

> **Could it be that the Catholic hierarchy only wants people to follow their consciences if those consciences are in agreement with the bishops' interpretation of Catholic teaching?**

contraceptives as allowable "if they seemed to be the best means to enable a couple to fulfil their total vocation not just if they were necessary to cure some physical dysfunction."[35] Häring's approach to medical therapy was similarly informed by openness to medical intervention where it allowed man to flourish in totality, but recognition that some forms of intervention could diminish his freedom—for example, through certain forms of psychiatry creating dependence upon the psychiatrist or imposing a set of beliefs. His book *Manipulation* thus warned: "He (man) must not allow anyone to manipulate him in his inner sanctuary, his conscience, his self-interpretation, and his reaching out for meaning and for significant personal relationships."[36] As Robert J Smith notes, while Häring "has unquestionable respect for the church and its role in the formation of conscience, he does not collapse into one fidelity to conscience and fidelity to the church's moral teachings."[37]

Today, most Catholics exercise their conscience against some of the pope's more well-known public policy pronouncements. Use of modern contraceptive methods is high in many predominantly Catholic countries. For women who are married or in a stable union, the figures for highly Catholic European countries are 77 percent in France, 66 percent in Spain and 63 percent in Portugal.[38]

In light of Catholic teachings on the primacy of conscience, the public policy efforts of the

hierarchy should take into account the experiences of individual Catholics as well as the beliefs of patients and healthcare providers of other faiths and no faith so that patients will not be refused any legal and medically appropriate treatment. Moreover, good practice should also compel a healthcare employer to make sure that the consciences of both the healthcare provider and the patient are accommodated by, for example, having policies in place that enable patients to receive whatever medications they are prescribed, or procedures they require.

Both the World Health Organization (WHO) and the International Federation of Gynaecology and Obstetrics (FIGO) have developed guidelines on this issue. They state that medical professionals who refuse to perform any procedure have a duty to refer the patient in a timely manner to another professional who does not have a conscientious objection. In cases where a patient's health is imminently threatened, the medical professional must put aside his or her objection and perform the procedure.[39]

Unfortunately, neither these practices nor policies have always been followed. In Europe, a significant case was that of *Tysiac v. Poland*, ruled on by the European Court of Human Rights in 2007. This case involved a Polish woman who was severely visually impaired and was denied an abortion to protect her physical health. Although several doctors concluded that the pregnancy and delivery posed a serious health risk, none would carry out the procedure. Following the birth of her child, the woman's eyesight deteriorated rapidly, leaving her with serious risk of blindness.

The European Court held that the Polish government had failed to fulfil its positive obligation, under Article 8 of the European Convention on Human Rights, to ensure the applicant's right to

respect for her private life. This finding was based specifically on the government's failure to establish an effective procedure through which the applicant could have appealed her doctors' refusal to grant her request for abortion. It awarded the applicant €25,000 for pain and suffering and €14,000 for legal fees.[40] While this case was not specifically about conscientious objection, it brought the issue very much to the fore, as exemplifying the need for procedural safeguards to protect women's ability to access abortion in circumstances where medical professionals have their own reasons for not undertaking the procedure.

If conscience truly is one's "most secret core and his sanctuary [where] he is alone with God, whose voice echoes in his depths," as the Catechism states, how can anyone, or any institution for that matter, justify coercing someone into acting contrary to her or his conscience? Could it be that the Catholic hierarchy only wants people to follow their consciences if those consciences are in agreement with the bishops' interpretation of Catholic teaching?

For either the Catholic hierarchy or antichoice organisations to lay claim to be the arbiters of any person's good conscience is clearly disingenuous. When pharmacists refuse to fill prescriptions for contraception, they violate the right to conscience of the woman, or man, standing in front of them. This does not fall under anybody's definition of what a good conscience is.

A Catholic Approach to Conscience

Given the ever-broadening character of refusal clauses, there is evidence that conscience is in danger of being killed by ideology, a point argued by James F Keenan SJ and Thomas R Kopfensteiner, when they write, "When conscience is reduced simply to serving norms or an ideology, conscience

> Institutions should defer to the individual conscience of the patient by respecting her or his right to comprehensive healthcare.

is dead."[41] The goal of any reasonable conscience clause must be to strike the right balance between the right of healthcare professionals to provide care that is in line with their moral and religious beliefs and the right of patients to have access to the medical care they need. For that reason, we believe that institution-encompassing refusal clauses are far too broad to be equitable—clamping down, as they do, on the rights of both the professional and the patient. This point has been taken up by and confirmed in the French Constitutional Courts, in a case involving a request from a head of department of a public health establishment who wanted to ban abortions in his department. The court ruled that refusal rights were limited to individuals, not institutions or departments.[42]

Within the field of medical ethics, the accepted resolution to a conflict of values is to allow an individual to act on his or her own conscience and for the institution (the hospital, clinic or pharmacy) to serve as the facilitator of all consciences. When an institution rejects this role and instead asserts its own "conscience-based" refusal to provide services, it violates the rights of both patients and healthcare providers—who may well consider the services the institution is denying to be profoundly moral and medically necessary—to make conscience-based decisions. There has always been an ethical preference for ensuring that patients have the primary opportunity to act on their conscience. Thus, it is the obligation of the institution to provide

doctors and nurses who will provide services that patients deem moral and that are legal, while allowing those medical professionals who choose to opt out to do so.

There is no doubt that there are times when the conscience of an individual doctor, nurse or pharmacist may conflict with the wishes or needs of a patient. This often happens in cases related to abortion. In these situations, a woman seeking an abortion should not have to worry about the religious and moral beliefs of her providers interfering with the provision of the best possible care—so it is in their best interests that only medical professionals committed to providing such services do so.

When this is not possible, a reasonable ethical fallback is for the institution to provide meaningful referrals to ensure that patients receive continuity of care without facing an undue burden, such as travelling long distances or encountering additional barriers to obtaining the desired services.

Therefore, while we recognise the right of individual medical professionals to decline to provide services they consider immoral, we believe that it goes too far to grant such a right to an entire institution—such as a hospital or managed-care provider. (Private institutions may provide whatever services they deem fit, but we are aware of no reasonably sized medical institution that receives absolutely no public funding.)

Regardless of what allowances are made for the individual conscience of the provider, institutions should defer to the individual conscience of the patient by respecting her or his right to comprehensive healthcare.

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CATHOLICS FOR CHOICE

1436 U Street NW, Suite 301
Washington, DC 20009

www.CatholicsForChoice.org
cfc@CatholicsForChoice.org
T: +1 (202) 986-6093
F: +1 (202) 332-7995

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